Supreme Court, U.S.
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No. 80-653

IN THE

Supreme Court of the United States

October Term, 1980

JOSEPH L. ALIOTO, et al.,
Petitioners,

vs.

JOSEPH B. WILLIAMS, et al. and LEO BAZILE, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

AMITAI SCHWARTZ*
MARGARET C. CROSBY
ALAN L. SCHLOSSER
American Civil Liberties Union Foundation of Northern California
814 Mission Street, Suite 301
San Francisco, Calif. 94103
(415) 777-4880

JEROME B. FALK, JR.
650 California Street
San Francisco, Calif. 94108

Counsel for Respondents
**Counsel of Record*

QUESTION PRESENTED

Can attorneys' fees permissibly be awarded pursuant to 42 U.S.C. §1988 to compensate for a successful challenge to dragnet police practices despite the fact that the underlying controversy was mooted by the time it could be resolved on appeal?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents LEO BAZILE, et al. respectfully request that the Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.[1/] The opinion of the Court of Appeals is reported at 625 F.2d 845 (9th Cir. 1980).

STATEMENT OF THE CASE

This case involves awards of attorneys' fees pursuant to 42 U.S.C. §1988 granted by the United States District Court for the Northern District of California, and affirmed by the Court of Appeals, in connection with Respondents' successful challenge in 1974 to San Francisco police

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1/ This Brief in Opposition is filed on behalf of Respondents in Bazile v. Alioto, No. C-74-0867 AJZ, one of two cases consolidated by the District Court. Respondents are Leo Bazile, Joseph George, Michael Jones, Charles Lawrence, Prince McGrew, and Albert C. Taylor.

policies known as Operation Zebra. The investigation code named "Zebra" had the objective of apprehending a notorious killer or killers, who had murdered twelve people and injured six others on city streets in a series of senseless killings.

The police practices challenged by Respondents' lawsuits consisted of stopping and frisking black males who resembled a profile so broad that 600 black citizens were forcibly stopped by San Francisco police during the week between the time Operation Zebra began and the time when the District Court preliminarily enjoined forcible stops in the absence of constitutionally adequate individuating cause. The dragnet was sufficient to generate what Petitioner Charles Barca, a Captain of Police, called a "hue and cry raised by the black people of San Francisco."[2/]

2/ Reporter's Transcript, United States District Court, April 24, 1974 [hereafter Tr. ____] at 60.

From the time the challenged practices were instituted and the completion of the evidentiary hearing on Respondents' request for a preliminary injunction, police officials issued at least six different revisions of the directives governing the practices, including a directive issued four days after the first lawsuit was filed, admitting that the preceding six days' stop-and-question tactics appeared to have been "unproductive and ineffective."[3/] On the second day of the evidentiary hearing, Petitioners introduced a new directive, the Revised Zebra Guidelines (Exhibit D-E, Tr. 250), which they argued cured any constitutional defects in the previous practices and made an injunction unnecessary. Tr. 266-272; Petitioners' Opening Brief in the Court of Appeals, No. 74-2149, at p. 33. But the District

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3/ Exhibit P-7, Tr. 78.

Court concluded that the Revised Zebra Guidelines had the effect of perpetuating the illegality and enjoined further forcible stops and interrogations of black citizens in San Francisco on the basis of resemblance to the profile alone. Appendix "D" to Petition for Writ of Certiorari at 3d-4d, 9d. The District Court also indicated its intention to award attorneys' fees to Respondents' counsel. Id. at 8d.

Petitioners sought a stay of the injunction in the District Court, which was denied. Tr. 319-323. They did not seek a stay from the Court of Appeals. Although they filed a notice of appeal, they did not seek to expedite the appeal in any way. Almost two years later the appeal was heard in the Court of Appeals in March, 1976, and ten months after that in January, 1977, the Court of Appeals dismissed the appeal and vacated the injunction on the grounds that

capture and conviction of the killers in March, 1976 mooted the underlying controversy. Williams v. Alioto, 549 F.2d 136 (9th Cir. 1977); Appendix "C" to Petition for Writ of Certiorari.

Nonetheless, the Court of Appeals found "the [Operation Zebra] program raised serious constitutional questions justifying an action for declaratory and injunctive relief." Williams v. Alioto, supra, 549 F.2d at 143; Appendix "C" at 14c. The court held that the "substantive issue on appeal...whether Operation Zebra violated the Fourth Amendment prohibition against unreasonable searches and seizures" (549 F.2d at 140, Appendix "C" at 7c) was moot. Id. at 145.

Subsequently, on Respondents' motions the District Court renewed the award of fees for Respondents' attorneys' efforts in connection with the District Court

proceedings. Appendix "B" to Petition for Writ of Certiorari. The Court of Appeals then affirmed the judgment on the award of fees because "[t]he preliminary injunction [had] prevented appellants from continued enforcement of their original guidelines, which is precisely the relief appellees sought. ...Our previous dismissal of the appeal as moot and vacation of the district court judgment does not affect the fact that for the pertinent time period appellees obtained the desired relief, upon findings by the district court that the original guidelines were unconstitutional." 549 F.2d at 847-848; Appendix "A" to Petition for Writ of Certiorari at 3a.

ARGUMENT

I. THE QUESTION PRESENTED DOES NOT WARRANT REVIEW BY THE COURT.

There is nothing in the Petition for a

Writ of Certiorari or the facts of this case that warrants review by the Court. Petitioners do not point to a single conflicting decision of any court. They do not demonstrate any substantial impact that resolution of this case by the Court might have on significant issues confronting lower courts in the application of the attorneys' fees provision of 42 U.S.C. §1988.

The Court of Appeals decision in this case is simply a variation of the principle resolved unanimously by the Court last Term in Maher v. Gagne, U.S. , 100 S. Ct. 2570, 65 L.Ed.2d 653 (1980). "The award of attorneys' fees under §1988 does not require an adjudication on the merits of the constitutional claim." 65 L.Ed.2d at 664 (Powell, J. concurring in the judgment). Maher clearly reflects Congress' judgment that parties prevail when they

"vindicate rights.'" 65 L.Ed.2d at 661, citing S. Rep. No. 94-1011, 94th Cong., 2nd Sess. 5 (1976). Petitioners attach significance to the fact that the merits of the underlying dispute in this case were mooted while the case was pending on appeal, and therefore argue that no resolution of the dispute ever occurred.

Unlike Hanrahan v. Hampton, U.S. , 100 S. Ct. 1987, 64 L.Ed.2d 670 (1980), however, where an interim award of fees was held to be unauthorized because resolution of the underlying controversy was yet to come, this case was resolved when the challenged Operation Zebra practices ended. As the Court of Appeals in this case clearly recognized, Respondents prevailed in the litigation when they successfully accomplished what the litigation was designed to do, that is, tailor Operation Zebra to Fourth Amendment requirements.

625 F.2d at 847; Appendix "A" to Petition for Writ of Certiorari at 3a. Maher and Hanrahan each recognize the considerable legislative history of the Civil Rights Attorneys' Fees Awards Act of 1976, amending 42 U.S.C. §1988, indicating that the "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief," S. Rep. No. 94-1011, 94th Cong. 2d Sess. 5 (1976). "As all good lawyers know, a lawsuit does not always have to go to final adjudication on the merits in order to be effective. Assuming the effectiveness in terms of practical results, the litigating stage attained is relevant only to the amount of the fees to be allowed, and not to the issue of whether they should be awarded at all." Yablonski v. United Mine Workers, 466 F.2d 424, 431 (D.C. Cir. 1972), cert. denied, 412 U.S. 918, 93 S. Ct. 2729, 37 L.Ed.2d 144 (1973).

In fact, numerous decisions have each held that mootness does not deprive a litigant of court awarded attorneys' fees to which the successful litigant would otherwise be entitled under 42 U.S.C. §1988. See, e.g., Morrison v. Ayoob, 627 F.2d 669 (3rd Cir. 1980); Robinson v. Kimbough, 620 F.2d 468, 475 (5th Cir. 1980); Ross v. Horn, 598 F.2d 1312 (3rd Cir. 1979), cert. denied, U.S. , 100 S. Ct. 3048, 65 L.Ed.2d 1136 (1980); International Society for Krishna Consciousness, Inc. v. Anderson, 569 F.2d 1027 (8th Cir. 1978).[4/] See also, McDonald v. Oliver, 525 F.2d 1217, 1225-1226 (5th Cir.), cert. denied, 429 U.S. 817,

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4/ Bly v. McLeod, 605 F.2d 134 (4th Cir. 1979), cert. denied, U.S. , 100 S. Ct. 1315, 63 L.Ed.2d 761 (1980) is not to the contrary. In that case the court acknowledged that mootness does not necessarily foreclose an award of fees but held the legal claim in the case to be without merit and found nothing in the record to indicate that the lawsuit led to changes in a challenged statute. 605 F.2d at 139.

97 S. Ct. 61, 50 L.Ed.2d 77 (1976); Wilderness Society v. Morton, 495 F.2d 1026, 1034 (D.C. Cir. 1974), rev'd. on other grounds sub. nom. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S. Ct. 1612, 44 L.Ed.2d 141 (1975); Yablonski v. United Mine Workers, supra.

The Civil Rights Attorneys' Fees Awards Act of 1976 was enacted because "civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. Rep. No. 94-1011 at 2. If vindication of rights permitting court awarded reimbursement requires that the underlying legal dispute be resolved through appeal, the likelihood of receiving awards will be considerably less in lawsuits seeking injunctive

remedies. This is especially true in the case of short-lived, episodic actions by government, like Operation Zebra, which require injunctive relief as a practical matter, but are unlikely to reach final adjudication on appeal for many years. See, e.g., Allee v. Medrano, 416 U.S. 802, 94 S. Ct. 2191, 40 L.Ed.2d 540 (1974).

The Petitioners in this case did not seek a stay of the preliminary injunction from the Court of Appeals, nor did they seek any other type of extraordinary relief. Surely, Congress has not required that a successful party bear the burden of expediting appellate resolution of the issues in a case in order to save the fee award.

Hence, the Petition for a Writ of Certiorari does not present an occasion for resolution of any important issue. Moreover, the decision of the Court of Appeals for the Ninth Circuit affirming the fee

award in this case is consistent with the decisions of the other courts of appeals and the legislative history of the Civil Rights Attorneys' Fees Awards Act of 1976.

II. THE QUESTION PRESENTED FOR REVIEW IS NOT NECESSARY TO THE DECISION BELOW.

In the course of the evidentiary hearing preceding the preliminary injunction, Petitioners promulgated the "Revised Zebra Guidelines," which they vigorously contended "corrected any constitutional infirmities in the earlier directives." Williams v. Alioto, supra, 549 F.2d at 141; Appendix "C" to Petition for Writ of Certiorari at 8c. Although the District Court correctly found the Revised Zebra Guidelines do not satisfy the Fourth Amendment, the new directives nonetheless represented Petitioners' effort voluntarily to comply with Fourth Amendment requirements in the face of litigation.

Indeed, Petitioners have always argued that the injunction was improper because the Revised Zebra Guidelines, that is, their voluntary actions, mooted the lawsuits. Tr. 266-272. If Petitioners' argument that the Revised Zebra Guidelines remedied the constitutional defects is accepted, Respondents become the prevailing parties under 42 U.S.C. §1988. Promulgation of the Guidelines in the course of litigation is precisely the sort of informal resolution of controversies which makes Respondents prevailing parties within the meaning of 42 U.S.C. §1988. Maher v. Gagne, supra; Hanrahan v. Hampton, supra. Hence, Respondents' entitlement to fees ripened when Petitioners voluntarily attempted to change Operation Zebra to conform to the Constitution. It is unnecessary for this Court to decide whether dismissal of the appeal of the injunction,

on grounds of mootness, upset Respondents' status as the prevailing parties in the litigation.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: December 30, 1980.

Respectfully submitted,

AMITAI SCHWARTZ*
MARGARET C. CROSBY
ALAN L. SCHLOSSER
American Civil Liberties
Union Foundation of
Northern California

JEROME B. FALK, JR.

Counsel for Respondents

*Counsel of Record